K Saravanan a/l S Karuppiah v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO A-05-18 OF 2000
ABDUL HAMID MOHAMAD, KC VOHRAH AND MOHD NOOR AHMAD JJCA
24 JUNE 2002

Criminal Law *— Dangerous drugs — s 37(j) — Chemist's analysis of dangerous drugs — No evidence to contradict chemist's finding — Whether chemist's analysis was properly undertaken — Dangerous Drugs Act 1952 s 37(j)*

Criminal Procedure *— Appeal — Grounds of — Misdirection by trial judge — Overwhelming evidence to support conviction — Whether misdirection by itself sufficient to displace findings of fact and conclusions made by trial judge*

Criminal Procedure *— Trial — Calling of witnesses — Failure by prosecution to call or offer to defence witnesses — Whether such failure occasioned a gap in prosecution's case — Whether such failure warranted the drawing of an adverse inference*

Evidence *— Burden of proof — Criminal case — Judge stating appellant had failed on a 'balance of probabilities' to raise any reasonable doubt on the prosecution's case — Overwhelming evidence to show prosecution had proved its case beyond reasonable doubt — Whether words 'balance of probabilities' placed an onerous burden on defence — Whether such words mere verbosity — Whether case a fit and proper case to apply proviso to s 60(1) of the Courts of Judicature Act 1964*

The appellant was convicted and sentenced to death on a charge of trafficking in 2279.9g of cannabis. He appealed. The facts, inter alia, revealed that the appellant was introduced to a police officer posing as a buyer (SP8) by one Suresh. The defence, inter alia, alleged that the appellant was framed up by one Aruldass. The appellant further alleged that there had been a serious fight with Aruldass and a few others a month before his arrest. Suresh was however not called as a witness by the prosecution nor made available to the defence. Aruldass was not called as a witness by the prosecution. Counsel for the appellant, inter alia: (i) contended that the failure to call or offer Suresh as a witness caused a gap in the case for the prosecution and also warranted the drawing of an adverse inference under s 114(g) of the Evidence Act 1950; (ii) complained of the non-calling of Aruldass by the prosecution; (iii) contended that there was a break in the chain of evidence in relation to the identity of the exhibits; (iii) asserted that the chemist (SP6) did not comply with the provisions of s 37(j) of the Dangerous Drugs Act 1952; (iv) submitted that the trial judge had misdirected himself in commenting on the failure of the defence to call witnesses to support the appellant's story about the alleged fight at the coffeeshop; and (v) argued that the inclusion of the words 'on a balance of probabilities' by the learned judge in his final conclusion had placed an onerous burden on the defence and was therefore a serious misdirection.

Held, dismissing the appeal:

(1) The case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC) cited by the appellant's counsel was not applicable on the facts of the instant case for two reasons. Firstly, in the instant case the trial judge had considered the failure of the prosecution to call Suresh or to offer him to the defence, and found that even if Suresh was called to testify it would not have made any difference in view of the clear and uncontradicted evidence adduced by the prosecution. Secondly, the prosecution had, through the evidence of SP8, explained why it was not able to call Suresh. The prosecution had therefore sufficiently discharged its statutory duty (see p 472A–B, D); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC) distinguished. The complaint by the defence on the non-calling of Aruldass by the prosecution was, in the court's view, after he was called as a witness by the defence and having regard to his testimony, without merit (see p 472E).

(2) There was no merit in counsel's contention regarding the identity of the exhibits. It was also manifestly clear that the provisions of s 37(j) of the Evidence Act 1950 had been complied with. Samples from all the compressed slabs of cannabis had been taken for analysis. The Court of Appeal would agree with the trial judge's finding that the chemist's analysis was properly undertaken and without flaw (see p 473F–G) .

(3) Although the trial judge had misdirected himself in commenting on the failure of the defence to call witnesses to support the appellant's story about the alleged fight at the coffeeshop, the misdirection by itself was not sufficient to displace the findings of fact and the conclusions made by the learned judge on the alleged fight in the face of the overwhelming evidence to support the conviction (see pp 473H–474A).

(4) A reading of the whole judgment showed that the trial judge had made the correct conclusion on the burden of proof after having properly and adequately assessed the evidence before him especially the defence. There was overwhelming evidence to show that the prosecution had proved its case beyond reasonable doubt and that the defence had failed to raise any reasonable doubt on the prosecution's case. The inclusion of the words 'on a balance of probabilities' was mere verbosity (see p 474F–G); *Shanmugam a/l Munusamy v Public Prosecutor* [1999] 1 MLJ 288 followed. In any event, this was a fit and proper case to apply the proviso to s 60(1) of the Courts of Judicature Act 1964 (see pp 474I–475A).

[Bahasa Malaysia summary

Perayu telah disabit dan dijatuhi hukuman mati atas pertuduhan mengedar 2279.9g dadah kanabis. Beliau telah merayu. Fakta-fakta

antara lainnya mendedahkan bahawa perayu telah diperkenalkan kepada seorang pegawai polis yang berlagak sebagai seorang pembeli (SP8) oleh seorang bernama Suresh. Pihak pembelaan antara lainnya mendakwa bahawa perayu telah dituduh palsu oleh seorang bernama Aruldass. Perayu selanjutnya mendakwa bahawa telah berlaku satu pergaduhan serius dengan Aruldass dan beberapa orang lain satu bulan sebelum penangkapan beliau. Suresh walau bagaimanapun telah tidak dipanggil sebagai saksi oleh pihak pendakwaan mahupun diadakan bagi pihak pembelaan. Aruldass telah tidak dipanggil sebagai saksi oleh pihak pendakwaan. Peguam bagi pihak perayu, antara lainnya: (i) menegaskan bahawa kegagalan untuk memanggil atau menawarkan Suresh sebagai saksi telah menyebabkan kekosongan di dalam kes bagi pihak pendakwaan dan juga mewajarkan persediaan satu inferens bertentangan di bawah s 114(g) Akta Keterangan 1950; (ii) mengadu bahawa pihak pendakwaan tidak memanggil Aruldass; (iii) menegaskan bahawa rangkaian keterangan berhubung dengan identiti ekshibit-ekshibit terputus; (iii) menegaskan bahawa ahli kimia (SP6) tidak mematuhi peruntukan-peruntukan s 37(j) Akta Dadah Berbahaya 1952; (iv) mengemukakan bahawa hakim perbicaraan telah tersalah arah akan dirinya dalam mengulas mengenai kegagalan pihak pembelaan untuk mengambil saksi untuk menyokong cerita perayu mengenai pergaduhan yang dikatakan di sebuah kedai kopi; dan (v) berhujah bahawa kemasukan perkataan 'on a balance of probabilities' oleh hakim yang bijaksana dalam kesimpulan muktamad beliau telah meletakkan suatu bebanan yang berat ke atas pihak pembelaan dan adalah dengan itu suatu salah arah yang serius.

Diputuskan, menolak rayuan tersebut:

(1) Kes *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC) yang disebut oleh peguam perayu tidak boleh dipakai ke atas fakta-fakta kes semasa kerana dua alasan. Pertamanya, dalam kes semasa hakim perbicaraan telah mempertimbangkan kegagalan pihak pendakwaan untuk memanggil Suresh atau untuk menawarkan beliau kepada pihak pembelaan, dan mendapati bahawa meskipun jika Suresh telah dipanggil untuk memberi keterangan ianya tidak akan mendatangkan sebarang perbezaan memandangkan keterangan yang jelas dan tidak bercanggahan yang telah dikemukakan oleh pihak pendakwaan. Keduanya, pihak pendakwaan telah, melalui keterangan SP8, memperjelaskan mengapa ianya tidak dapat memanggil Suresh. Pihak pendakwaan telah dengan itu melaksanakan kewajipan statutorinya dengan secukupnya (lihat ms 472A–B, D); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC) dibeza. Aduan mengenai Aruldass yang tidak dipanggil oleh pihak pendakwaan tidak bermerit oleh kerana Aruldass telah dipanggil sebagai

seorang saksi oleh pihak pembelaan dan keterangan beliau telah dipertimbangkan (lihat ms 472E). A

(2) Tidak terdapat sebarang merit di dalam penegasan peguam berhubung dengan identiti ekshibit-ekshibit tersebut. Ianya juga amat jelas bahawa peruntukan-peruntukan s 37(j) Akta Keterangan 1950 tersebut telah dipatuhi. Contoh-contoh papak ganja mampat telah diambil untuk dianalisa. Mahkamah Rayuan akan bersetuju dengan keputusan hakim perbicaraan bahawa analisa ahli kimia telah dijalankan dengan sempurna dan tiada kecacatan (lihat ms 473F–G). B

(3) Meskipun hakim perbicaraan telah tersalah arah akan dirinya dalam mengulas mengenai kegagalan pihak pembelaan untuk memanggil saksi-saksi untuk menyokong cerita perayu mengenai pergaduhan yang dikatakan di sebuah kedai kopi, salah arahan itu dengan sendirinya tidak memadai untuk menolak keputusan fakta dan kesimpulan yang dibuat oleh hakim yang bijaksana mengenai pergaduhan yang dikatakan menurut keterangan yang mempengaruhi bagi menyokong pensabitan tersebut (lihat ms 473H–474A). C D

(4) Membaca keseluruhan penghakiman tersebut menunjukkan bahawa hakim perbicaraan telah membuat kesimpulan yang betul atas bebanan membukti setelah menilai dengan sempurna dan secukupnya keterangan di hadapan beliau khasnya pembelaan tersebut. Terdapat keterangan yang mempengaruhi bagi menunjukkan bahawa pihak pendakwaan telah membuktikan kesnya di luar keraguan yang wajar dan pihak pembelaan telah gagal untuk membangkitkan sebarang keraguan yang wajar ke atas kes pihak pendakwaan. Kemasukan perkataan 'on a balance of probabilities' adalah hanya penggunaan perkataan yang panjang lebar (lihat ms 474F–G); *Shanmugam a/l Munusamy v Public Prosecutor* [1999] 1 MLJ 288 diikut. Dalam apa keadaan, ini adalah suatu kes yang sempurna dan wajar untuk memakai proviso kepada peruntukan s 60(1) Akta Mahkamah Kehakiman 1964 (lihat ms 474I–475A).] E F G

Notes

For cases on burden of proof in criminal cases, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 345–356.

For cases on Dangerous Drugs Act 1952 s 37(j), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) para 110. H

For cases on calling of witnesses, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3854–3863.

For cases on grounds of appeal, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 374–387.

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Cases referred to

Goh Ah Yew v PP [1949] MLJ 150 (refd)

Illian & Anor v PP [1988] 1 MLJ 421 (refd)
Mohamed Ali v PP [1962] MLJ 230 (refd)
Shanmugam a/l Manusamy v PP [1999] 1 MLJ 288 (folld)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (distd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 s 37(j)
Evidence Act 1950 ss 6, 37(j) 114(g)

Appeal from: Criminal Trial No 45–5 of 1999 (High Court, Ipoh)

Gurbachan Singh (*R Naidu* with him) (*Ng Choo Beng, R Naidu & Partners*) for the appellant.
Kamarul Hisham (Deputy Public Prosecutor, AG's Chambers) for the respondent.

Mohd Noor Ahmad JCA (delivering the judgment of the court): The appellant was convicted and sentenced to death on a charge of trafficking in 2279.9g of cannabis. The charge reads:

> Bahawa kamu bersama-sama pada 16 September 1998 jam lebih kurang 11.30 malam di tepi Restoran Syuen, Taman Klebang, Chemor, Ipoh, di dalam Daerah Kuala Kinta, di dalam Negeri Perak, telah didapati mengedar dadah ganja sejenis dadah berbahaya sejumlah berat 2279.9g, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama dibaca bersama s 34 Kanun Keseksaan.

On appeal, we dismissed the appeal and confirmed the conviction and sentence. We now give our reasons.

The prosecution case

Briefly, on the night of 27 July 1998, Detective Sargeant Bursa ('SP8') posing as a buyer, was introduced by his informer to one Suresh. The informer left the scene and the two had some discussion on a drug deal. Suresh told SP8 that the price of cannabis was RM2,500 per kg. On 16 September 1998 at 4pm, Suresh introduced SP8 to the appellant. During their initial discussion, the appellant agreed to supply SP8 three kg of cannabis and asked SP8 for RM7,500 as payment. SP8 disagreed and told the appellant that payment was to be made by cash on delivery basis. Then, at the appellant's request the three of them left in SP8's car for Restoran Syuen where they had a drink. After that the appellant borrowed SP8's car to fetch the drugs, leaving SP8 and Suresh at the restaurant. At about 7pm the appellant returned and asked SP8 to come back to the restaurant at 11pm the same night. The police operation to trap and arrest the appellant was set in motion around the restaurant at 10.15pm. The police party waited for about 40 minutes but the operation was called off as the appellant did not turn up. Immediately after it was called off, SP8 received a call through his handphone from the appellant requesting SP8 to

wait at the restaurant as the appellant was coming over. The trap was reset. Some moments later, the appellant arrived on a motorcycle carrying one Murthi (the co-accused) as pillion. The appellant stopped next to SP8's car and left after telling SP8 to wait there while he went to fetch the drug. Ten minutes later, he returned with the pillion and parked the motorcycle behind SP8's car. Then, he went over to SP8 carrying with him a black plastic bag and sat on the front passenger's seat next to SP8 while Murthi took the back seat. SP8 then inspected the contents of the black plastic bag which the appellant brought and found it to contain three slabs of compressed cannabis. Thereafter, at a prearranged signal the police party closed in and arrested the appellant and Murthi. At the time of the arrest, the black plastic bag which contained the drug was found on the appellant's lap. The drug was sent for analysis and the chemist confirmed that it was cannabis. The learned judge accepted the chemist's findings.

Murthi, who was charged together with the appellant on a joint charge of trafficking was acquitted and discharged without his defence been called. However, the appellant was ordered to enter his defence on the unamended charge.

The appellant's defence/version of events

The appellant gave evidence on oath. Briefly, he stated that on that night at 7pm he and Murthi went to the restaurant for a drink until 10pm. As they were about to leave the restaurant on the motorcycle SP8 came in his car, introduced himself as a policeman and stated to interrogate them. SP8 accused him of being a drug dealer to which he denied. Shortly afterwards, a police party arrived in two cars and arrested him and Murthi. They were then bundled into the back seat of one of the cars and taken to a house where one Aruldass lived. Aruldass was also arrested and put in another car. All of them were taken to a police station. At the police station, he was punched many times by the police and was asked to admit possession of the black plastic bag which he had seen earlier at the gear box section of the car. He did not admit. He contended that there was bad blood between him and Aruldass because he and Murthi used to disturb Aruldass's sister. As a result, there was a serious fight between him and Murthi on one side and Aruldass and Suresh on the other which took place at a coffee shop in Taman Bertuah about a month before the arrest. After the fight, Aruldass had warned him that he would be put in jail. Three weeks later, Suresh met up with him at the same coffee shop in Taman Bertuah and offered to settle and find a way to raise money. He asked Suresh how that could be done, and Suresh replied that he would give him some drugs to sell. He refused but Suresh asked to think about it. Five days later, at the same coffee shop, he and Murthi were again asked by Suresh and Aruldass whether they agreed to the arrangement to deal with drugs, to which they replied they would not do it. Aruldass responded by saying that it was alright and left the coffee shop. The gist of the defence is that the appellant was framed up by Aruldass.

A Having reviewed the findings of primary facts made by the learned judge, we are satisfied that there is nothing to justify our interference with the findings based either on the credibility of witnesses or upon inferences drawn from other facts. Therefore, we decline to disturb the conclusions made by the trial judge.

B Before us, the conviction is being attacked on five main grounds. The first ground involves the provisions of adverse inference under s 114(g) of the Evidence Act 1950 ('the Act'). It was contended by Mr Gurbachan that Suresh played an important role in the transaction. He was not just an introducer as concluded by the learned judge but the negotiator for the drug deal and hence, a trafficker. That being the case, he ought to have been C called by the prosecution or offered for cross-examination or at least made available to the defence at the close of the case for the prosecution or in default, or otherwise been given an explanation why they were unable or unwilling to call him. Further, there was no suggestion that his testimony would have been hostile to the prosecution or unreliable. Therefore, by such failure, not only there was a gap in the narrative of the prosecution without D the negotiator's testimony but also, the presumption under s 114(g) of the Act would have been attracted. The learned counsel cited the Supreme Court case of *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 in support thereof. Upon scrutiny of the notes of proceedings, it was obvious that at the close for the prosecution, Suresh was neither called by the prosecution nor made E available to the defence and the issue was taken up by Mr Naidu, the learned counsel for the appellant, in his submission before the trial court, both at the close of the case for the prosecution and at the close of the defence. On this issue, the learned judge said:

> F Learned counsel for the appellant had submitted that the failure by the prosecution to call Suresh as a witness or have him at least offered for cross examination was fatal to its case, and had raised an adverse presumption under s 114(g) of the Evidence Act. My view is that Suresh although his identity was known to the appellant, would not throw any further light on the prosecution story that had not already been fully narrated by SP8. Suresh played the role as an introducer, the person who had brought SP8 and the appellant into contact. It was in evidence and this fact was not disputed under G cross examination that Suresh thereafter disappeared from the scene and was in no way involved in the negotiation on the buying and selling of the cannabis that took place between the agent provocateur, SP8 and the appellant. It was only during their second meeting, in the absence of Suresh, that details on the delivery of the drugs were discussed and agreed upon. In view of the clear and uncontradicted evidence adduced by the prosecution I held the view that even H if Suresh was called to testify, it would have not made any difference, and as such the presumption of an adverse inference cannot be invoked against the prosecution. In the Supreme Court case of *Namasiyiam & Ors v PP* [1987] 2 MLJ 336, it was found that an informer had played an active role to be an accomplice in the true sense of the word.
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> I However, it was held that in the light of the overwhelming prosecution evidence, the presence of the informer at the trial would not have made any difference, and that s 114(g) of the Evidence Act was not applicable.

Ti Chuee Hiang v PP is a recent decision but it is not applicable here, for two reasons. Firstly, in that case although the counsel for the appellant had criticized the prosecution for failing to call the informer, the judge did not direct his attention to that point at all and for that reason the Supreme Court concluded that there was a serious misdirection by way of non-direction which has occasioned a grave miscarriage of justice in the trial court, and whereas in the case before us the learned judge did direct his mind to that point and therefore, there was no serious misdirection. Secondly, the prosecution, through the testimony of SP8, did explain why it was not able to call Suresh. SP8 deposed in the examination in chief:

> Saya telah cuba mencari orang bersama Suresh tetapi tidak berhasil sehingga ke hari ini. Saya dapat tahu rumahnya beralamat 236 Taman Lintang Sg Siput dan telah pernah pergi ke rumah itu tetapi tidak dapat mengesan Suresh. Pihak Polis masih cuba mengesan Suresh sekarang.

And when cross-examined by Mr Naidu, he said:

> Tidak benar yang saya betul-betul tidak cari Suresh.

He was not seriously challenged by the defence on this matter. Therefore, to our mind, the prosecution had sufficiently discharged its statutory duty in this respect. We follow the earlier decision of the Supreme Court relied upon by the learned judge.

Also, on the first ground, before us Mr Naidu raised the issue of non-calling of Aruldass as a witness by the prosecution. In our view, as Aruldass was called as a witness for the defence and having regard to his testimony, clearly this ground has no merit. Perhaps, it may be useful to quote what was said by Ong J (as he then was) in *Mohamed Ali v PP* [1962] MLJ 230 on presumptions of fact and presumptions of law, viz at pp 231–232:

> In drawing presumptions under s 114 of the Evidence Ordinance 1950, it is to be observed that what the section says is that the existence of certain facts may be presumed which the court 'thinks likely to have happened' in the circumstances of the particular case. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumptions of law, Devlin LJ said recently in *Berry v British Transport Commission* [1961] 3 WLR 450 at p 463:
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> > '... Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable — in the sense that 'estoppels are odious', and the 'doctrine should never be applied without a necessity for it'; per Bramwell LJ in *Baxendale v Bennett* [1878] 3QBD 525 at p 529 — because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.'

A On the second ground, Mr Naidu contended that there was a break in the chain of evidence in relation to the identity of the exhibits, that is to say, the cannabis especially as to their colour, recovered at the time of the arrest until its production in court. He relied on the evidence of SP5 who said 'Warna basicnya adalah warna daun hijau ...', the evidence of SP8 who deposed 'Warna ketulan mampat itu ialah kehijauan dan kuning-kuning B semasa saya melihatnya' and on the evidence of SP6 (the chemist) who stated '... di dalam paket plastik tersebut terdapat tiga bahan tumbuhan mampat' in order to show inconsistencies between the testimonies of the witnesses. We find no merit in his contention because the facts revealed that the drug found in the black plastic bag was in the form of three slabs of C compressed cannabis and the drug found in the orange plastic bag, which was recovered from the appellants body, was in the form of loose dried plant materials which was the subject matter of a charge under s 6 of the Act of which he was acquitted and discharged. SP8 and SP6 talked about the former and whereas SP5 spoke about both the former and the latter. We find no inconsistencies between them except that SP8 did mention the D colour of the compressed cannabis and whereas SP6 made no mention about it and SP5 did describe the colour of both forms where green was the basic colour.

With regard to the third ground, Mr Naidu asserted that SP6 did not comply with the provisions of s 37(j) of the Act when taking samples of the drug for analysis. SP6 stated:

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> Seterusnya saya telah membuat satu proses saintifik iaitu proses 'random sampling' dengan mengambil sebanyak 32 sample rawak (random sampling) daripada 'A1', 32 sample rawak daripada 'A2' dan 32 daripada 'A3' dan 16 sample rawak dari 'B'. Sampel-sampel rawak ini saya telah bahagikan kepada dua, satu untuk ujian 'Duquenois — Levine' dan sebahagian lagi untuk ujian F kromatografi lapisan nipis (Thin Layer Chromathography).

It is manifestly clear that the provisions of s 37(j) of the Act had been complied with. In fact samples from all the compressed slabs of cannabis had been taken for analysis. On this issue, the learned judge concluded:

> G I had considered appellant's counsel's submission on the infirmities of the chemist's analysis on the subject drugs and found them to be without merit. The court was satisfied that the analysis was properly undertaken and concluded it to be without any flaw. There was no evidence from any expert to contradict the chemist's finding, it must therefore be accepted at face value as true and accurate (see *Munusamy v PP* [1987] 1 MLJ 496).

H We agree with that conclusion.

In respect of the fourth ground, Mr Gurbachan submitted that the learned judge had misdirected himself in commenting on the failure of the defence to call witnesses to support the appellant's story about the alleged fight at the coffeeshop in Taman Bertuah and cited the cases of *Illian & Anor v PP* [1988] 1 MLJ 421 and *Goh Ah Yew v PP* [1949] MLJ 150 in I support thereof. We agree that the learned judge was wrong to have done so. However, the misdirection by itself was not sufficient to displace the findings of fact and the conclusions made by the learned judge on the

alleged fight in the face of the overwhelming evidence to support the conviction.

On the last ground, Mr Gurbachan strenuously attacked the final conclusion made by the learned judge. The learned judge concluded:

> In the end, this court was left with no doubt that he prosecution had satisfied its onus of proof and that the appellant had failed, *on a balance of probabilities* to raise any reasonable doubt on the prosecution's case. (Emphasis added.)

He argued that as the prosecution did not rely on any statutory presumption to prove its case, the defence has a lesser burden to cast a reasonable doubt in the prosecution's case. The inclusion of the words 'on a balance of probabilities' by the learned judge had placed an onerous burden on the defence and therefore, a serious misdirection. We are of the view that this passage must not be looked at in isolation but to be read together with the whole judgement. The learned judge stated:

> It may be convenient at this point to immediately state that the court found this explanation to be too far fetched to be believable, and further, on an objective assessment, had found it to be too fanciful to cast a reasonable doubt on the prosecution's case (*Mohd Yatin v PP* [1950] MLJ 57).

(at p 20 of the appeal record)

> In my view the evidence of these two witnesses, called by the defence, completely destroyed any chance of my finding that the appellant's story might be worthy of creating a reasonable doubt, even if unbelievable.

(at p 21 of the appeal record)

> Having heard and seen the appellant, I have no hesitation, in evaluating his evidence, to totally reject it as one too incredible to be believed. In short, his story was a complete lie and had not raised any reasonable doubt on the prosecution's case.

(at p 22 of the appeal record)

From these passages, we are satisfied that the learned judge had made the correct conclusion on the burden of proof after having properly and adequately assessed the evidence before him especially the defence. We have scrutinized the whole evidence and we are satisfied that there is overwhelming evidence to show that the prosecution had proved its case beyond reasonable doubt and that the defence had failed to raise any reasonable doubt on the prosecution's case. Therefore, we regard the inclusion of the words 'on a balance of probabilities' as mere verbosity. In *Shanmugam a/l Manusamy v PP* [1999] 1 MLJ 288, the trial judge said that there was a prima facie case against the appellant that if unrebutted would render a conviction. This court, after having gone through the evidence adduced by the prosecution and having no doubt that there was ample evidence to show at the end of the prosecution case that the prosecution had proved its case beyond reasonable doubt, held that the choice of the words 'prima facie' was only the wrong usage of words. Whatever it is, to our mind, this is a fit and proper case to apply the proviso to the provisions of

A s 60(1) of the Courts of Judicature Act 1964 as we consider that no substantial miscarriage of justice had occurred.

For the above reasons, we find there is no merit in this appeal.

Appeal dismissed.

B Reported by Andrew Christopher Simon

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